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COMMERCIAL APPROPRIATION OF A PERSON'S IMAGE: *WELLS V ATOLL MEDIA (PTY) LTD* (UNREPORTED 11961/2006) [2009] ZAWCHC 173 (9 NOVEMBER 2009)

SJ Cornelius*

1 Introduction

Our modern society has become transfixed with celebrity. The mass media lap up every sordid little snippet of news about actors, music stars, sport stars, politicians, royals, socialites and other famous people and sell it to consumers who eagerly await the next celebrity scandal. Business people and marketers also endeavour to cash in on the popularity enjoyed by the stars and realise the value of associating merchandise or trademarks with the rich and famous.

This leads to difficulties when the attributes of a person are apparently used without consent, which poses new questions to the law: should the law protect the individual against unlawful use of his or her image? If so, to what extent should such protection be granted? These were some of the questions which the court had to answer in *Wells v Atoll Media (Pty) Ltd*.[1]

2 Facts

The plaintiff, as legal guardian of her minor daughter, launched an application against the defendants, as owner/publisher and as editor of a surfing magazine *ZigZag*, for a claim of damages arising out of the publication of a photograph of her

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1 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).

daughter and causing the offending photograph to be displayed on national television.

The photograph was presumably taken while the plaintiff and her family were on vacation in Cape St Francis and published in the April 2006 edition of the magazine, without the plaintiff's knowledge, authority or consent. The girl was 12 years old at the time the photograph was presumably taken. It appeared in a section of the magazine entitled "dishing up the photo feast" and, as it was published, was stamped bearing the word "filth" as well as a caption at the foot of the photograph reading "all-natural Eastern Cape honey". The cover of the magazine proclaimed "100% pure filth photos inside". The photograph was also screened as part of an advertisement on national television.

Although the photograph was taken from behind and the girl's face was obscured by the angle at which it was taken as well as by her hair, many people apparently recognised the girl in the photograph. A consequence of this was that disparaging remarks were made about the girl in mobile text messages, as well as electronic chat-rooms and communities, where she was called a "slut" and "PE's little porn star". The girl was also distressed to learn that the picture had been put up as a pin-up poster in such public places as a craft shop at a local casino and a local boys' school.

3 Judgment

The plaintiff based her case primarily on two issues: firstly, the publication of the words "Pure Filth" in conjunction with the photograph was defamatory and secondly, the publication of the photograph without consent amounted to an invasion of the girl's privacy. As a result, the court had to determine whether the girl could be recognised by reasonable readers of the magazine, whether the language used in conjunction with the photograph was defamatory and whether the girl's dignity and rights to privacy had been infringed.

Davis J concluded that the girl could be identified and that publication of the photograph and the accompanying words were indeed defamatory. He held that publication of the photo concerned was not reasonable as

> [t]he manner in which the photograph was published without any regard to the context or implications for a twelve year old girl … does not, in my view, satisfy the test of reasonable publication … .

Davis J found support for his conclusion in section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child. He found that publication of the photograph without any attempt to obtain consent and with the clear purpose of including it to increase the attraction of a commercial publication was not in the best interest of the girl and constituted a failure of the standard of the reasonable publisher in the position of the defendants.

On the questions pertaining to the invasion of privacy and the infringement of dignity raised by the plaintiff, he added that

> [i]n *Grütter v Lombard and another* 2007 (4) SA 89 (SCA), at para 8 Nugent JA, in a most carefully researched judgment, noted that it was generally accepted academic opinion that features of a personal identity are capable and indeed deserving of legal protection. In the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal [sic] rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.

In the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal [sic] rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.

As a result, on this ground as well, Davis J ruled in favour of the plaintiff. However, he did not base this aspect of his judgment on the invasion of privacy and the reliance on *Grütter*[2] is significant here. In the context of this case, it means that the way the photograph was published constituted both defamation and an unlawful appropriation of the girl's image. It was this unlawful appropriation which resulted in the violation of her privacy.

4 Discussion

This case is of little significance in so far as it relates to the common law of defamation. However, the restatement of the law laid down in *Grütter v Lombard*[3] in respect of the appropriation of an image is of much significance. Of particular interest is Davis J's apparent conclusion that appropriation of a person's image constitutes an unjustifiable invasion of the personality rights of the individual, where a photograph is published for the benefit of a magazine sold to make profit. It invites the question if all magazines and newspapers are not sold for profit and if every photograph published in newspapers and magazines is not published "with the clear purpose of including it to increase the attraction of a commercial publication".[4] It also seems to suggest that the media may not display or publish a photograph depicting an individual subject unless that subject has consented to such display or publication.

If this is indeed how Davis J interpreted the law, the interpretation holds far-reaching implications for the media. The possibility of such an interpretation demands a deeper analysis of the law in so far as it relates to the unauthorised use of a person's image. Such an analysis requires some understanding of the historical foundations of the law in this regard, as well as some reflection on the law in other jurisdictions to determine if they can assist in making sense of this judgment. In particular, since this case raises the issue of privacy in the context of the unauthorised use of a person's image, it may be worthwhile to pay particular attention to Dutch law and the laws in

2 *Grütter v Lombard* 2007 4 SA 89 (SCA).
3 *Grütter v Lombard* 2007 4 SA 89 (SCA).
4 *Grütter v Lombard* 2007 4 SA 89 (SCA): Davis J at para 45.

various jurisdictions in the United States of America. As I will illustrate below, in Dutch law and the laws in many of the US states, the infringement of a person's right to identity invariably raises issues of privacy.

5 Historical development

Ancient legal systems already recognised certain personality rights, but were generally concerned with protection of individuals against physical assaults only. For instance, the Twelve Tables of early Roman law provided for a variety of physical impairments for which predetermined compensation could be claimed in delict.[5] These principles would eventually form the basis on which the *actio iniuriarum* would develop during the Roman Republic.[6] During this period, the focus in the Roman law of personality rights shifted from physical assault to *contumelia* or insult as the basis for unlawfulness.[7] Eventually Roman law reached the stage where any insult through word, act or conduct could be actionable. The form of the insult ranged from physical assault to cases of insult where no physical attack took place.[8] Eventually, it was decreed that

> [t]he Praetor outlaws that which could lead to insult for another. So whatever one does or says to embarrass someone else that gives rise to the *actio iniuriarum*.[9]

Roman law consequently reached the stage where a variety of personality rights was recognised and any infringement of a person's body, honour or dignity could in principle found a claim with the *actio iniuriarum*.[10] And, more significantly from a modern perspective, the scope of the *actio iniuriarum* could be extended on the strength of the general *boni mores* test to cover situations not previously envisaged under that remedy.[11] However, it seems that in Roman law the unauthorised use of another person's name or image was actionable only if such use would also amount

5 *Tab* VIII.1 - 4. See also Zimmermann *Obligations* 1050 *et seq*.
6 Zimmermann *Obligations* 1050.
7 Borkowski *Roman Law* 348; Van Zyl *History* 343; Neethling *Persoonlikheidsreg* 51.
8 *D* 47.10.1.1 *et seq*.
9 *D* 47.10.15.27. Own translation. The original text reads: *Generaliter vetuit Praetor quid ad infamiam alicuius fieri. Proinde quodcumque quis fecerit vel dixerit, ut alium infamet, erit actio iniuriarum*.
10 *D* 47.10.1.2.
11 Neethling *Persoonlikheidsreg* 55.

to an insult, as when someone wrote, published or performed a poem or song that ridiculed someone else.[12] For some time it seemed that our modern law would follow suit. In *Kidson v SA Associated Newspapers Ltd*,[13] a photo of three nurses appeared next to a newspaper article in which the headline and introductory text stated that lonely nurses were looking for boyfriends to provide (probably more than) company. Here the court steadfastly held on to the requirement of insult, with the result that two of the plaintiffs failed with their claims. One of the plaintiffs succeeded on the grounds that she was married and therefore apparently insulted by the insinuation that she was potentially unfaithful. The courts in *Grütter*[14] and *Wells*[15] have, however, now established that our modern law has moved beyond the requirement of insult in this kind of case.

The *actio iniuriarum* was also received into medieval European legal systems.[16] Voet[17] explains that *iniuria* consisted of any infringement of a person's good name or reputation. It could be committed through acts, words, writings or collusion with another. But it seems that insult was still a requirement if someone wished to succeed with a claim for the unauthorised use of his image.[18] The focus was solely on privacy and dignity, rather than a concern with unfair appropriation of economic value derived from the image of another. From these concepts the modern concepts of privacy and dignity developed in the private or civil law of many modern legal systems.[19] From there only a small adjustment in focus was required to deal with commercial exploitation of an individual's image.

On the other hand, in early English law, royal justice was a favour which had to be specifically granted by the King. A party who wished to originate a suit in the King's courts consequently first had to obtain a royal writ from the King's Chancery to

12 *D* 47.10.15.27.
13 *Kidson v SA Associated Newspapers Ltd* 1957 3 SA 461 (W).
14 *Grütter v Lombard* 2007 4 SA 89 (SCA).
15 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).
16 Voet *Commentarius ad Pandectas* 47.10.7; Pothier *Traité des Obligations* 116, 118; Lessius *De Iustitia et Iure, Ceterisque Virtutibus Cardinalis Libri Quatuor* 2.7.5.19; Durandus *Speculum Iuris* 4.4.2.15; Ubaldi *Commentaria Corpus Iuris Civilis* 9.2.41.
17 Voet *Commentarius ad Pandectas* 47.10.7.
18 Voet *Commentarius ad Pandectas* 47.10.7.
19 Zimmermann *Obligations* 1050 *et seq*.

authorise commencement with the action.[20] As a result, early English law followed a procedural approach as opposed to the principles-based approach that was followed in other European systems.

Where one person suffered a wrong at the hands of another, this was in certain cases seen as a disturbance of the King's peace and the wronged party could obtain the writ of trespass. Initially, three kinds of trespass were recognised: battery or assault, taking goods, and entering land or a house.[21] Trespass was soon modified to extend its scope to various other wrongs.[22] The effect of this was that different writs or actions were developed for different wrongs.[23] The Anglo-American law of torts in the modern sense developed from this in the nineteenth century.[24]

Towards the end of the eighteenth century in the United States of America, the Fourth Amendment, which dealt with unreasonable searches and seizures, introduced the concept of personal sovereignty.[25] This in turn gave rise to the systematic protection of domestic privacy in various state courts and the imposition of penalties for criminal trespass, which in turn gave rise to civil remedies against intrusions by strangers.[26] In 1880 this process gained substantial momentum with the publication of an article in which Warren and Brandeis[27] sought to extract a right of privacy from the protection afforded by common law copyright, on the grounds that the protection afforded to the expression of thoughts merely amounted to enforcement of the more general right of each individual to be left alone.[28] The right to privacy at common law was first recognised by the Supreme Court of Georgia in *Pavesich v New England Life Insurance Co*[29] and this provided the impetus for courts

20 Jenks *History* 47.
21 Reeves *History* 84 *et seq*.
22 Reeves *History* 88 *et seq.*
23 Lunny and Oliphant *Tort* 2.
24 Burdick *Torts* 1.
25 Originally the Fourth Amendment restricted the power of only the Federal Government, until the US Supreme Court ruled in *Mapp v Ohio* 367 US 643 that it was also applicable to state governments.
26 Glenn *Privacy* 47 *et seq*.
27 Warren and Brandeis 1890 *HLR* 193.
28 Beverley-Smith *Personality* 146 *et seq*.
29 *Pavesich v New England Life Insurance Co* 50 SE 68.

in other states to follow suit.[30] Significantly, many of the early cases on the right to privacy in the United States dealt with the unauthorised taking or publication of photographs depicting the aggrieved parties. This provided the logical basis, then, for the eventual protection of identity in various US states today.

6 Comparative analysis

Most legal systems today recognise identity as a personality interest which deserves protection. The level of protection, however, differs substantially from one jurisdiction to the next.

Dutch law provides elaborate protection against unauthorised use of an individual's image. The *Auteurswet* protects the individual against unauthorised publication of his or her portrait. The explanatory memorandum to the *Auteurswet* explains that the concept "portrait" can be defined as any depiction of a person's face with or without any other parts of the body, irrespective of how the depiction was made. Section 21 of the *Auteurswet* provides that publication of the portrait is not authorised if the subject or, after demise of the subject, one of his or her surviving dependants has a reasonable interest in opposing publication.

The requisite interest can take one of two forms. Firstly, there is the interest in privacy. A subject can oppose publication of a portrait if the subject can show that such publication will infringe on his or her right to privacy. By the nature of things, famous people such as politicians and film and sport stars must endure invasion of privacy to a greater extent than others, but there are limits, and when the limits are exceeded this excess can form the basis for a claim. Therefore, when a magazine stated on the cover that a football player had a homosexual relationship with a singer but the article in the magazine declared the opposite, it was held that there had been a breach of the football player's privacy.[31]

30 See eg. *Smith v Suratt* 1926 WL 1024 (Alaska); *Mabry v Kettering* 117 SW 746 (Arkansas); *Thayer v Worcester Post Co* 187 NE 292 (Massachusetts); *Vassar College v Loose-Wiles Biscuit Co* 197 F 982 (Missouri); *Flake v Greensboro News Co* 195 SE 55 (North Carolina); *Harlow v Buno Co* 36 Pa D&C 101 (Pennsylvania).

31 *Vondelpark* 1988 NJ 1000.

Secondly, there is a commercial interest. Dutch law recognises the fact that the image of a famous person has become a commodity.[32] In the *'t Schaep met de Vijf Pooten* case,[33] the *Hooge Raad* laid down two requirements before an individual could claim a commercial interest. Firstly, the individual concerned must already have obtained some fame from practising his or her profession. The concept "profession" is interpreted broadly, so that even amateur sports people, who do not strictly speaking practise sport as their profession, are included here if they have gained some fame from participation in their sports.[34] Secondly, there must be a commercial exploitation of such fame. This aspect was clearly explained in the *De slag om het voetbalgoud* case.[35] A book, entitled *De slag om het voetbalgoud*, filled with photographs of the players in the Dutch football team which played in the final of the 1974 World Cup tournament, was published. This in itself did not violate any of the players' rights as it merely amounted to a factual report on a contemporary matter of public interest. However, the publishers sold the entire print run of the book to a company which used the book as part of its marketing campaign. The *Rechtbank* Haarlem held that this latter aspect amounted to commercial exploitation, with the result that it infringed on the players' portrait rights.

In the United States of America, various states protect identity under the broader concept of privacy. The *Second Circuit Court of Appeals* in New York laid the foundation in *Haelan Laboratories Inc v Topps Chewing Gum*.[36] The appellant contracted with various baseball players for the exclusive right to use their images in the marketing of the appellant's chewing gum. The respondent did the same in the marketing of its chewing gum, but did not obtain the consent of the players concerned. The court held that, apart from the statutory right to privacy in the New York Civil Rights Law, a right to publicity could also be derived from the common law of New York.

32 *Teddy Scholten* 1961 NJ 160.
33 *'t Schaep met de Vijf Pooten* 1979 NJ 383.
34 *Arnold Vanderlijde* 1994 NJ 658.
35 *De slag om het voetbalgoud* 1974 NJ 415.
36 *Haelan Laboratories Inc v Topps Chewing Gum* 202 F 2d 866.

The Second Circuit Court of Appeals eventually held in *Pirone v MacMillan*[37] that the court had erred in *Haelan Laboratories*[38] since the right to identity was recognised only by statute in the New York Civil Rights Law and that there was no distinguishable common law right to identity in New York.[39] By this time, however, *Haelan Laboratories*[40] had already served repeatedly as authority and led to the recognition of a common law right to publicity in more than thirty of the US states.[41]

37 *Pirone v MacMillan* 894 F 2d 579.

38 *Haelan Laboratories Inc v Topps Chewing Gum* 202 F 2d 866.

39 See also *Chimarev v TD Waterhouse Investor Services Inc* 280 F Supp 2d 208; *Myskina v Conde Nast Publications Inc* 386 F Supp 2d 409; *Messenger ex rel Messenger v Gruner Jahr Printing and Publishing* 94 NY 2d 436; *Freihofer v Hearst Corporation* 65 NY 2d 135; *Novel v Beacon Operating Corporation* 446 NYS 2d 118; *In re Dora P* 418 NYS 2d 59; and *Kiss v County of Putnam* 398 NYS 2d 729.

40 *Haelan Laboratories Inc v Topps Chewing Gum* 202 F 2d 866.

41 See for instance *Allison v Vintage Sports Plaques* 136 F 3d 1443 in Alabama (the framing and resale of collectors' cards depicting sports stars are unlawful); *Olan Mills Inc v Dodd* 353 SW 2d 22 in Arkansas (the use of a person's image in an advertising brochure without consent is unlawful); *Venturi v Savitt Inc* 468 A 2d 933 in Connecticut (a claim by a golf player for the unauthorised use of his photograph in an advertisement fails because the plaintiff could not prove intent to cause harm); *Vassiliades v Garfinckel's Brooks Bros* 492 A 2d 580 in the District of Columbia (a plastic surgeon and publisher who published "before" and "after" pictures of patients violated the privacy of the patients, whether they were famous or not); *Martin Luther King Jr Center for Social Change Inc v American Heritage Products Inc* 296 SE 2d 697 in Georgia (the court prohibits the unauthorised sale of statuettes made to the image of King); *Fergerstrom v Hawaiian Ocean View Estates Inc* 441 P 2d 808 in Hawaii (a property developer may not use pictures of the purchaser and construction of a house in an advertising brochure without consent); *Johnson v Boeing Airplane Co* 262 P 2d 808 in Kansas (an employee who tacitly agreed to have a photograph taken next to an aircraft and for the photograph to be used in an advertising brochure forfeits a claim against the employer); *Prudhomme v Proctor and Gamble Co* 800 F Supp 390 in Louisiana (advertising showing an impersonator of a famous chef violates the privacy of the chef); *Lawrence v AS Abell Co* 475 A 2d 448 in Maryland (the use of newspaper clippings with pictures of babies in advertising for a newspaper does not violate the privacy of the mothers or the babies); *Carson v Here's Johnny Portable Toilets Inc* 698 F 2d 831 in Michigan (the unauthorised use of a famous person's name is unlawful if that person can be identified); *Candebat v Flanagan* 487 S 2d 207 in Mississippi (a reference to a particular person's motor vehicle collision without consent in advertising is unlawful); *Haith v Model Cities Health Corp* 704 SW 2d 684 in Missouri (an employer may not use the names of medical practitioners whom it employs in advertising without their consent); *Gilham v Burlington Northern Inc* 514 F 2d 660 in New Jersey (where a company owns the copyright in a picture of an individual that company may consent to the use of that picture on the cover of a magazine); *Benally v Hundred Arrows Press Inc* 614 F Supp 969 in New Mexico (the publication of a photograph showing Navajo natives in a book on the life and work of a photographer is not unlawful); *Reeves v United Artists Corp* 765 F 2d 79 in Ohio (the right to publicity is not heritable and lapsed on the death of a famous boxer); *Martinez v Democrat-Herald Publishing Co* 669 P 2d 818 in Oregon (a picture of a student with a history of drug abuse in an article on drug use on campus does not violate the rights of the student); *Gee v CBS Inc* 612 F 2d 572 in Pennsylvania (where a record company owns the copyright in a musical performance it may use the name and image of the singer on the record cover); *Staruski v Continental Telephone Co* 581 A 2d 266 in Vermont (an employer may not use a picture of an employee in advertising without consent); *Crump v Beckley Newspapers Inc* 320 SE 2d 70 in West Virginia (a picture of a female coal miner in an article on women in coal mines is not unlawful).

In *Allison v Vintage Sports Plaques*,[42] Kravitch J of the federal appeals court for the Eleventh Circuit summarised the common law position succinctly.[43] She explained that in Alabama, as in various other jurisdictions in the United States, the right to the use of a person's image is protected under the *tort of invasion of privacy*. This tort can be committed in any one of four ways. Firstly privacy is violated through access to the plaintiff's physical and intimate secludedness, secondly through publication in conflict with generally accepted norms of decency, thirdly through publication which places the plaintiff in a false light, and fourthly through unauthorised use of the plaintiff's image for commercial gain. The third category is also known as the "tort of false light publicity", while the fourth category is also known as the "tort of commercial appropriation".

The basis for the protection of the right to identity in terms of these measures is the financial interest of the individual and not merely human dignity, as one would expect with the invasion of privacy. To succeed with a claim under commercial appropriation, the plaintiff must prove that the respondent used the plaintiff's identity, that the purpose of the use of the plaintiff's identity is commercial or other gain for the respondent, that the plaintiff's image was used without consent and that the plaintiff will suffer loss or prejudice as a result. In this regard, a court would look at the commercial damage to the business value of the human identity or the extent to which the plaintiff is deprived if he or she does not receive money for authorising the use of his or her image.

Some jurisdictions in the United States of America follow a twofold approach where both statutory and common law measures are applied to provide extensive protection against the unauthorised use of an individual's image.[44] In California

42 *Allison v Vintage Sports Plaques* 136 F 3d 1443.

43 Under US law, when a federal court is deciding a common law issue, it is bound to follow the specific decisions of the state supreme court for the state whose common law applies. Thus, the federal court in *Allison* was predicting how the Alabama Supreme Court would define the scope of the tort of invasion of privacy.

44 The mixed approach is followed in California (compare s 3344 of the Civil Code and *Michaels v Internet Entertainment Group Inc* 5 F Supp 2d 823); Florida (compare S 540.08 of the Florida Statutes and *Zim v Western Publishing Co* 573 F 2d 1318); Illinois (compare the Illinois Right of Publicity Act and *Douglas v Hustler Magazine Inc* 769 F2d 1128); Kentucky (compare S 391.170 of the Kentucky Statutes and *Foster-Milburn Co v Chinn* 120 SW 364); Nebraska (compare S 20-

section 3344 of the Civil Code provides that it is unlawful for one person to use the name, voice, autograph, photo or likeness of someone else for purposes of advertising, trade, or solicitation of customers or clients, without consent. An injured party may, in terms of this provision, cumulatively claim damages consisting of the profit which the wrongdoer gained from the use of the person's image, as well as punitive damages.[45] The protection is not limited to famous people, but is at the disposal of anyone whose image is used without consent.[46] Section 1449 of the Oklahoma Statutes contains essentially the same provision.

Apart from the extensive statutory provisions to protect the individual against unauthorised use of his or her image, common law protection is also recognised in California[47] and Oklahoma.[48] In *Porten v University of San Francisco*[49] the court explained that the right to identity can also be protected by means of the tort of invasion of privacy. This tort can be committed in one of four ways. Firstly, privacy is breached through violation of the plaintiff's physical and intimate seclusion, secondly

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202 of the Nebraska Revised Statutes and *Carson v National Bank of Commerce* 501 F 2d 1082); Nevada (compare S 597-770 *et seq* of the Nevada Revised Statutes and *People for the Ethical Treatment of Animals v Berosini Ltd* 895 P 2d 1269); Oklahoma (compare S 1449 of the Oklahoma Statutes and *McCormack v Oklahoma Publishing Co* 613 P 2d 98); Tennessee (compare S 47-25-1101 *et seq* of the Tennessee Code and *Elvis Presley International Memorial Fund v Crowell* 733 SW 2d 89); Texas (compare S 26.001 *et seq* of the Texas Property Code and *National Bank of Commerce v Shaklee Corp* 503 F Supp 533); Utah (compare S 76-9-407 of the Utah Code and *Cox v Hatch* 761 P 2d 556); Wisconsin (compare S 895.50 of the Wisconsin Statutes and *Hirsch v SC Johnson and Sons Inc* 280 NW 2d 129). Although the exact formulation of the various provisions differs from one state to the next, the underlying principles are essentially the same. As a result, I refer to a few examples only.

45 Subdivision (a) provides: (a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorised use, and any profits from the unauthorised use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

46 *KNB Enterprises v Matthews* 78 Cal App 4th 362.

47 *Michaels v Internet Entertainment Group Inc* 5 F Supp 2d 823; *Abdul-Jabbar v General Motors Corp* 75 F 3d 1391.

48 *McCormack v Oklahoma Publishing Co* 613 P 2d 98.

49 *Porten v University of San Francisco* 64 Cal App 3d 825.

through publication contrary to generally accepted norms of decency, thirdly through publication which places the plaintiff in a false light and fourthly, by using the image of the plaintiff for commercial gain without consent.

7 South African law

In South Africa the common law approach has thus far been followed where the attributes of a person have been used without consent for commercial purposes. After some uncertainty, the Supreme Court of Appeal in *Grütter v Lombard*[50] at last recognised an image as an aspect of personality which demands protection, and this has now been confirmed by the Western Cape High Court in *Wells v Atoll Media (Pty) Ltd.*[51]

In *Grütter*[52] the Supreme Court of Appeal had to decide if the name of the appellant could still be used in the name of a law firm even though his relationship with the firm had come to an end. The appellant did not claim any exclusive right to use the name, nor did he allege that the respondents made themselves guilty of passing off. The appellant merely made the case that it was well-known that he was one of the persons to whom the name referred and that he no longer wished to be associated with the firm now that his relationship with them had ceased.

In a unanimous judgment, Nugent JA held that privacy is merely one of a variety of interests that enjoy recognition in the concept of personality rights in the context of the *actio iniuriarum*. The interest which a person has to protect his or her identity against exploitation cannot be distinguished therefrom and is similarly encompassed by that variety of personality rights which is worthy of protection.

Nugent JA further referred to Neethling[53] who explains that

50 *Grütter v Lombard* 2007 4 SA 89 (SCA).
51 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).
52 *Grütter v Lombard* 2007 4 SA 89 (SCA).
53 Neethling *Persoonlikheidsreg* 44 *et seq*.

> [i]dentity is that uniqueness which identifies each person as a particular individual and as such distinguishes him from others. Identity manifests itself in various *indicia* by which the person involved can be recognised: that is, facets of his personality which are distinctive or peculiar to him, such as his life history, his character, his name, his creditworthiness, his voice, his handwriting, his outward shape, etcetera. A person has a definitive interest that the unique nature of his being and conduct must be respected by outsiders. Similarly, identity is infringed upon if *indicia* thereof is used without consent in a way which is not compatible with the image of the right holder.

On the basis of these principles, Nugent JA ruled that the appellant was entitled to insist that there should be no potential for error and ordered the respondents to desist from using his name and rectify the matter within a period of 30 days.

Neethling[54] is apparently of the opinion that the right to identity is infringed only if the attributes of a person are used without consent in a way which cannot be reconciled with the actual image of the individual concerned. To succeed with a claim where the attributes of a person are used without permission, it therefore seems to be a requirement that the person concerned should indicate that there was some misrepresentation of his or her personality. In this regard, it may be sufficient if the unauthorised use of a person's attributes could create the impression that the person concerned consented to such use or has been compensated for such use.

This approach is also followed in *Grütter*,[55] but there is also a second seminal principle intertwined in the judgment of Nugent JA which concerns the unjustified use of an individual's image for commercial gain. Nugent JA indicated that the interest of a person in protecting his or her image from commercial exploitation cannot qualitatively be distinguished from and is equally encompassed by the variety of personality rights which are protected under the concept of dignity.[56] He further indicated that *in casu* that there was no justification for the respondents to use the appellant's name for their own commercial benefit.[57] This would then mean that the right to identity can in this context be violated in one of two ways.

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54 Neethling *Persoonlikheidsreg* 308 *et seq.*

55 *Grütter v Lombard* 2007 4 SA 89 (SCA).

56 *Grütter v Lombard* 2007 4 SA 89 (SCA) 95D: "The interest that a person has in preserving his or her identity against unauthorised exploitation seems to me to be qualitatively indistinguishable and equally encompassed by that protectable 'variety of personal rights'".

57 *Grütter v Lombard* 2007 4 SA 89 (SCA) 96B: "... I can see no such considerations that justify the

Firstly, a person's right to identity is violated when the attributes of that person are used without permission in a way which cannot be reconciled with the true image of that person. Apart from the unauthorised use of a person's image, this kind of infringement also entails some kind of misrepresentation concerning the individual, such as that the individual approves of or endorses a particular product or service or that an attorney is a partner in a firm, while this is not the case. The unlawfulness in this kind of case is found in the misrepresentation concerning the individual and, consequently, in the violation of the right to human dignity.

Secondly, the right to identity is violated if the attributes of a person are used for commercial gain without authorisation by another person. Apart from the unauthorised use of the individual's image, such a use also primarily entails a commercial motive, which is exclusively aimed at promoting a service or product or to solicit clients or customers. The unlawfulness in this case is found mainly in the infringement of the right to freedom of association and the commercial exploitation of the individual.

This is not stated explicitly in *Grütter*,[58] but can be deduced from a careful analysis of the judgment. The significance of the judgment by Davis J in *Wells*[59] is that this interpretation of the judgment in *Grütter*[60] has now received judicial confirmation. Davis J clearly interpreted the judgment in *Grütter*[61] as holding that the appropriation of a person's image or likeness for the commercial benefit or advantage of another calls for legal intervention in order to protect the individual concerned.

Thirdly, the judgment in *Wells v Atoll Media (Pty) Ltd*[62] highlights an important aspect of the law of personality to which the court in *Grütter*[63] also referred, and that is the

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unauthorised use by the respondents of Grütter's name for their own commercial advantage".

58 *Grütter v Lombard* 2007 4 SA 89 (SCA).

59 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).

60 *Grütter v Lombard* 2007 4 SA 89 (SCA). See Cornelius 2008 *TSAR*; Cornelius 2008 *ISLRP*.

61 *Grütter v Lombard* 2007 4 SA 89 (SCA).

62 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).

63 *Grütter v Lombard* 2007 4 SA 89 (SCA).

interrelation between the various manifestations of personality rights. *Wells*[64] simultaneously involved the right to a good name, the right to privacy and the right to identity. I have previously criticised the approach in various jurisdictions in the United States, which views the unauthorised use of a person's image as a violation of the right to privacy, as jurisprudentially less sound than an approach which bases the unauthorised use of a person's image on the infringement of *dignitas*.[65] Privacy in this context is usually violated through access to a person's physical and intimate secludedness, or through publication in conflict with generally accepted norms of decency.[66] The criticism was based on the argument that the unauthorised use of a person's image would generally not involve either of these aspects.

However, *Wells v Atoll Media (Pty) Ltd*[67] has clearly illustrated how the unauthorised use of a person's image could also negatively impact on that person's privacy. In the first instance, no matter how one looks at the matter, the publication of a provocative photograph of a twelve-year-old girl simply cannot be reconciled with generally accepted norms of decency. It would be hard to reconcile it, even if the girl and her parents or guardian had consented to such use. Without consent, such publication should simply not be tolerated. Secondly, the publication of the photograph exposed the girl to disparaging mobile text messages sent to her telephone. This latter fact clearly illustrates how the unauthorised use of an image can also draw unwelcome attention and affect the private life of the individual concerned. As a result, the criticism of the American approach may be unfounded.

But what is the implication of all of this for media freedom? With any action for the infringement of a subjective right, a variety of conflicting interests must be weighed against one another. With the use of a person's image, the rights to identity, human dignity and freedom of association of the individual must often be weighed against the user's right to the freedom of expression and the freedom of the media. This important question relating to the right to identity is only touched upon as an aside in

64 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).
65 See Cornelius 2008 *TSAR*; Cornelius 2008 *ISLRP*.
66 See *Allison v Vintage Sports Plaques* 136 F 3d 1443.
67 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).

the *Grütter*[68] and *Wells*[69] cases. In both instances the courts made it clear that the right to identity is not absolute, but did not discuss this issue much further.

It goes without saying that the use of a person's attributes must be unlawful before a plaintiff will succeed with any claim in delict. In other cases where satisfaction or damages were claimed due to the infringement of *dignitas*, the courts have already recognised certain grounds of justification which would mean that the apparent violation of personality rights would indeed be lawful.

Neethling[70] correctly states that public policy can justify an apparent violation of the right to identity, but it would also make sense to consider the other grounds on which the infringement of *dignitas* can be justified. These grounds include consent,[71] truth and public interest,[72] fair comment[73] and jest.[74] In addition Neethling[75] also indicates that the public interest in art can in appropriate cases justify the use of a person's image.

8 Conclusion

Because the South African approach is derived from a common law based on general principles, the law as laid down and contemplated in *Grütter*[76] and restated in *Wells*[77] is open and receptive to change, so that current developments in commerce can be accommodated. This approach provides broader scope for protection than most statutory or codified provisions dealing with the right to identity. On the one hand the South African law avoids discrimination based on fame or the lack thereof, which seems to beset Dutch law in this regard. On the other hand, it seems as if South African law now recognises a variety of attributes that are worthy

68 *Grütter v Lombard* 2007 4 SA 89 (SCA).
69 *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009).
70 Neethling *Persoonlikheidsreg* 315.
71 Neethling, Potgieter and Visser *Deliktereg* 89.
72 Neethling, Potgieter and Visser *Deliktereg* 313.
73 Neethling, Potgieter and Visser *Deliktereg* 315.
74 Neethling, Potgieter and Visser *Deliktereg* 317.
75 Neethling *Persoonlikheidsreg* 315.
76 *Grütter v Lombard* 2007 4 SA 89 (SCA).
77 *Wells v Atoll Media (Pty) Ltd* (11961/2006) [2009] ZAWCHC 173 (9 November 2009).

of protection, in contrast to statutory or codified provisions which, by definition, can protect only specifically-listed attributes.

The judgment in *Wells*[78] is significant for various reasons. It is a restatement of the law laid down in *Grütter*[79] and provides a judicial interpretation of the judgment in the latter case. In the process, Davis J has also redefined the right to identity and provided some clarity on what infringement of that right would amount to.

It is now trite that everyone has a right to identity. For these purposes, identity includes the collection of specific congenital and acquired attributes which are unique to the individual and distinguish the individual from others. When the attributes of a person are used without consent, the right to identity can be violated in one of four ways. A person's right to identity can be infringed if the attributes of that person are used without permission in a way which –

(a) cannot be reconciled with the true image of the individual concerned;
(b) amounts to commercial exploitation of the individual;
(c) cannot be reconciled with generally accepted norms of decency; or
(d) violates the privacy of that person.

From this analysis, it would seem that our law has now reached a level of development which is not very different from the common law tort of invasion of privacy which applies in most US states.

In the final analysis, though, *Wells*[80] should not be seen as a precedent to suggest that the media may not display or publish a photograph depicting an individual subject unless that subject has consented to such display or publication. The unique facts of the case and the fact that Davis J repeatedly qualified his judgment with reference to the context of the case mean that such an interpretation would be exaggerated. The user can therefore still, in certain appropriate cases, justify the

78 *Wells v Atoll Media (Pty) Ltd* (11961/2006) [2009] ZAWCHC 173 (9 November 2009).
79 *Grütter v Lombard* 2007 4 SA 89 (SCA). See Cornelius 2008 *TSAR*; Cornelius 2008 *ISLRP*.
80 *Wells v Atoll Media (Pty) Ltd* (11961/2006) [2009] ZAWCHC 173 (9 November 2009).

unauthorised use of a particular person's attributes on the basis of public interest if such use takes place mainly in connection with public interest reporting, jest or art.

What is clear though is that the law in South Africa, because of the flexibility of a common law approach based on general principles, probably leads the way when it comes to the protection of an individual against the unauthorised use of his or her attributes.

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Oklahoma Statutes Section 1449
Tennessee Code Section 47-25-1101
Texas Property Code Section 26.001
Utah Code Section 76-9-407
Wisconsin Statutes Section 895.50

List of abbreviations

HLR	Harvard Law Review
ISLRP	International Sports Law Review Pandektis
TSAR	Tydskrif vir die Suid-Afrikaanse Reg